TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 205

NATIONAL LEATHER COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

FILED MARCH 28, 1927

(32,569)

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[fols. 1 & 2] Judge's certificate to clerk omitted in printing.

[fol. 3]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

WRIT OF ERROR AND RETURN—Filed February 25, 1927

UNITED STATES OF AMERICA, ss:

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between National Leather Company, Plaintiff, and Commonwealth of Massachusetts, Defendant, wherein was drawn in question the validity of a treaty or statute of the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity: a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Su-

preme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

February 25, 1927.

Allowed by Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this seventeenth day of March, A. D. 1927.

John F. Cronin, Clerk.

[File endorsement omitted.]

[fol. 4] [Caption omitted]

[fol. 5] In Supreme Judicial Court of Massachusetts

In Equity

Suffolk County:

No. 41617. Eq.

National Leather Company, a Corporation Organized under the Laws of the State of Maine and Having a Usual Place of Business Within the Commonwealth of Massachusetts, Petitioner,

v.

Commonwealth of Massachusetts, Respondent

No. 42124. Eq.

National Leather Company, a Corporation Organized under the Laws of the State of Maine and Having a Usual Place of Business Within the Commonwealth of Massachusetts, Petitioner,

v.

Commonwealth of Massachusetts, Respondent

Reservation—June 25, 1925

These cases came on to be heard before me and, at the request of the parties, I reserve the same on the pleadings and an agreed statement of facts for the determination of the full court.

Henry K. Braley, Justice, Supreme Judicial Court.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 41617

PETITION FOR ABATEMENT OF TAX—Filed October 3, 1924

To the Honorable the Justices of the Supreme Judicial Court:

Respectfully represents your petitioner

(1) That it is a corporation organized under the laws of the State of Maine and lawfully doing business within the Commonwealth of Massachusetts.

[fol. 6] (2) That it has at all times duly and seasonably filed its tax returns in accordance with law.

(3) That it is provided in Section 39 of Chapter 63 of the General Laws that

"every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following: * * *

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and a half per cent of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth."

(4) That said Chapter 63 of the General Laws and acts in amendment thereof and addition thereto also provide certain minimum standards for the rate of taxation of foreign corporations which are not material to the present proceeding because the tax on your petitioner computed according to such minimum standards would be less than the amount conceded by it to be properly assessable.

(5) That is provided in Paragraph 4 of Section 30 of said Chapter 63 of the General Laws that

"'Corporate excess employed within the commonwealth' by a foreign corporation (shall mean) such proportion of

the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date. * * *"

(6) That your petitioner on April 1, 1923 and continuously since its incorporation was actually engaged in business on its own account, and on said April 1, 1923 it also owned and held certain securities as permanent investments, namely certain shares of stock in two corporations organized under the laws of the State of Maine named respectively National Calfskin Company and A. C. Lawrence Leather Company; and said securities were not employed in any business within the commonwealth on that date.

(7) That nevertheless the Commissioner of Corporations and Taxation, in determining the excise tax upon your petitioner for the year 1923, included said stock of said two corporations among the assets employed in business within [fol. 7] the commonwealth by your petitioner, and by virtue of such inclusion assessed upon your petitioner an excise tax for said year in the sum of $30,719.16, whereas if said stock had not been included as aforesaid the tax which would have been, and in accordance with law should have been, assessed upon your petitioner would have amounted to but $17,299.42, or $13,419.74 less than the tax actually assessed.

(8) That upon the sixth day of April, 1924, your petitioner, upon compulsion and under duress, and after protest in writing, paid the tax thus illegally assessed upon it, with interest amounting to $343.21, making a total of $31,062.37.

(9) That your petitioner is aggrieved by the exaction of part of said excise, namely $13,419.74, for the reason that the inclusion of said stocks of foreign corporations among the assets employed in business in this commonwealth was not authorized by the statute; and that if authorized by statute it would be none the less illegal and void as an attempt to reach by taxation property not within the jurisdiction of the commonwealth, in violation of the

Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioner prays that such portion of said excise as was assessed without authority of law be abated, and that the amount so illegally exacted be repaid to it, with interest and costs.

By its Attorneys, Putnam B. Smith, Philip Nichols.

In Supreme Judicial Court of Massachusetts

Answer—Filed December 4, 1924

The respondent for answer to the petition in the above cause says as follows:

1. The respondent admits the allegations of paragraph 1 of the petition.

2. The respondent denies the allegations of paragraph 2 of the petition. It says that the petitioner filed no return within the first ten days of April, 1923, as of April first, as required by G. L., c. 63.

3. The respondent admits that the petitioner on April 1, 1923, and continuously since its incorporation was engaged in business on its own account and that on said date it also owned and held shares of stock in the National Calfskin Company and the A. C. Lawrence Leather Company, both [fol. 8] organized under the laws of the State of Maine, as alleged in paragraph 6 of the petition. It denies that said securities were not employed in any business within the Commonwealth on said date, and denies all the other allegations in said paragraph. It further alleges that the petitioner and said other two corporations were both actually engaged in business in the Commonwealth on said date, that said securities were held in the Commonwealth, and that said other two corporations were subsidiary companies of the petitioner.

4. The respondent admits that the Commissioner of Corporations and Taxation, in determining the value of the corporate excess employed within the Commonwealth for

the purpose of computing the excise tax upon the petitioner for the year 1923, included said stock of said other two corporations among the assets employed in business within the Commonwealth by the petitioner, as alleged in paragraph 7 of the petition. It denies the remaining allegations of said paragraph.

Further answering the respondent says that during the period in question the petitioner carried on no business outside the Commonwealth, and that the value of the securities in question was accordingly allocated to Massachusetts, but that the Commissioner did not allocate to Massachusetts securities owned by the petitioner of other corporations which were not engaged in business within the Commonwealth.

The respondent further says that the Commissioner originally assessed to the petitioner an excise based on its corporate excess employed within the Commonwealth on April 1, 1923, in the sum of $21,676.49, and subsequently assessed an additional excise based on such corporate excess amounting to $9,042.67, making a total assessment of $30,719.16.

5. In answer to paragraph 8 of the petition the respondent says that on April 8, 1924, the petitioner paid under protest the taxes assessed with interest amounting to $343.21, making a total payment of $31,062.37. The respondent denies each and every other allegation in paragraph 8 of the petition.

6. The respondent denies the allegations of paragraph 9 of the petition, and says that the taxes assessed were in every respect legal and valid.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General.

[fol. 9] In Supreme Judicial Court of Massachusetts

Order Consolidating Cases—June 23, 1925

These cases came on to be heard at this sitting and thereupon, upon consideration thereof, it is ordered, adjudged

and decreed that said cases be, and the same are hereby, consolidated for the purpose of being heard together.

By the Court.

John F. Cronin, Clerk.

[Bradley, J.]

In Supreme Judicial Court of Massachusetts

No. 42124

Petition for Abatement of Tax—Filed Nov. 7, 1924

To the Honorable the Justices of the Supreme Judicial Court:

Respectfully represents your petitioner.

(1) That it is a corporation organized under the laws of the State of Maine and lawfully doing business within the Commonwealth of Massachusetts.

(2) That it has at all times duly and seasonably filed its tax returns in accordance with law.

(3) That it is provided in Section 39 of Chapter 63 of the General Laws that

"every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following: * * *

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and a half per cent of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth."

(4) That said Chapter 63 of the General Laws and acts in amendment thereof and addition thereto also provide certain minimum standards for the rate of taxation of foreign corporations which are not material to the present

proceeding because the tax on your petitioner computed according to such minimum standards would be less than the amount conceded by it to be properly assessable.

[fol. 10] (5) That it is provided in Paragraph 4 of Section 30 of said Chapter 63 of the General Laws that

" 'Corporate excess employed within the commonwealth' by a foreign corporation (shall mean) such proportion of the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date. * * *"

(6) That your petitioner on April 1, 1922 and continuously since its incorporation was actually engaged in business on its own account, and on said April 1, 1922 it also owned and held certain securities as permanent investments, namely certain shares of stock in two corporations organized under the laws of the State of Maine named respectively National Calfskin Company and A. C. Lawrence Leather Company; and said securities were not employed in any business within the commonwealth on that date.

(7) That nevertheless the Commissioner of Corporations and Taxation, in determining the excise tax upon your petitioner for the year 1922, included said stock of said two corporations among the assets employed in business within the commonwealth by your petitioner, and by virtue of such inclusion assessed upon your petitioner an excise tax for said year in the sum of $34,292.25, whereas if said stock had not been included as aforesaid the tax which would have been, and in accordance with law should have been, assessed upon your petitioner would have amounted to but $19,827.87, or $14,464.38 less than the tax actually assessed.

(8) That of said tax part, namely $12,806.88, was assessed and paid in regular course, and the remainder or $21,485.37 was assessed as an additional tax in April, 1924, and was paid by your petitioner upon compulsion and under duress, and after protest in writing, on May 17, 1924.

(9) That your petitioner is aggrieved by the exaction of part of said excise, namely $14,464.38, for the reason

that the inclusion of said stocks of foreign corporations among the assets employed in business in this commonwealth was not authorized by the statute; and that if authorized by statute it would be none the less illegal and void as an attempt to reach by taxation property not within the jurisdiction of the commonwealth, in violation of the Fourteenth Amendment to the Constitution of the United States. [fol. 11] Wherefore your petitioner prays that such portion of said excise as was assessed without authority of law be abated, and that the amount so illegally exacted be repaid to it, with interest and costs.

By Its Attorneys Philip Nichols, Putnam B. Smith, Joseph A. Boyer.

In Supreme Judicial Court of Massachusetts

Answer—Filed January 7, 1925

The respondent for answer to the petition in the above cause says as follows:

1. The respondent admits the allegations of paragraph 1 of the petition.

2. The respondent denies the allegations of paragraph 2 of the petition. It says that the petitioner filed no return within the first ten days of April, 1922, as of April first, as required by G. L., c. 63.

3. The respondent admits that the petitioner on April 1, 1922, and continuously since its incorporation was engaged in business on its own account and that on said date it also owned and held shares of stock in the National Calfskin Company and the A. C. Lawrence Leather Company, both organized under the laws of the State of Maine, as alleged in paragraph 6 of the petition. It denies that said securities were not employed in any business within the Commonwealth on said date, and denies all the other allegations in said paragraph. It further alleges that the petitioner and said other two corporations were both actually engaged in business in the Commonwealth on said date, that said securities were held in the Commonwealth, and

that said other two corporations were subsidiary companies of the petitioner.

4. The respondent admits that the Commissioner of Corporations and Taxation, in determining the value of the corporate excess employed within the Commonwealth for the purpose of computing the excise tax upon the petitioner for the year 1922, included said stock of said other two corporations among the assets employed in business within the Commonwealth by the petitioner, as alleged in paragraph 7 of the petition. It denies the remaining allegations of said paragraph.

[fol. 12] Further answering the respondent says that during the period in question the petitioner carried on no business outside the Commonwealth, and that the value of the securities in question was accordingly allocated to Massachusetts, but that the Commissioner did not allocate to Massachusetts securities owned by the petitioner of other corporations which were not engaged in business within the Commonwealth.

The respondent further says that the Commissioner originally assessed to the petitioner an excise based on its corporate excess employed within the Commonwealth on April 1, 1922, in the sum of $12,806.88, and subsequently assessed an additional excise based on such corporate excess amounting to $21,485.37, making a total assessment of $34,292.25.

5. In answer to paragraph 8 of the petition the respondent says that the excise originally assessed in the sum of $12,806.88 was paid by the petitioner on October 20, 1922, and that the additional excise in the sum of $21,485.37, assessed on May 1, 1924, was paid by the petitioner under protest on May 17, 1924. The respondent denies all other allegations in said paragraph 8.

6. The respondent denies the allegations of paragraph 9 of the petition, and says that the taxes assessed were in every respect legal and valid.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

ORDER CONSOLIDATING CASES—JUNE 23, 1925

These cases came on to be heard at this sitting and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that said cases be, and the same are hereby, consolidated for the purpose of being heard together.

By the Court.

John F. Cronin, Clerk.

[Braley, J.]

[fol. 13] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

41617 Eq., 42124 Eq.

AGREED STATEMENT OF FACTS

It is agreed that such of the following facts as are competent, relevant and material are true, and that the court may draw inferences of fact from the facts herein stated:

1. These two petitions are for the abatement of excises assessed to the petitioner as a foreign corporation for the years 1922 and 1923.

2. The petitioner, National Leather Company, was organized under the laws of the State of Maine in the year 1919. Its original authorized capital was $30,000,000, which was afterwards reduced to $7,500,000, and new capital was secured by the issue of $13,000,000 of preferred stock. The petitioner's business during the years in question and prior and subsequent thereto was purchasing hides and skins having them tanned by other companies and selling the leather through the tanners. It operated no tanneries itself until the year 1924. The business of the company during said entire period was conducted wholly in Massachusetts, its business officers were located solely in Massachusetts, and it carried on no active business outside the State. About two-thirds of the hides and leather belonging to the petitioner at all times during its existence have been located outside Massachusetts.

3. A. C. Lawrence Leather Company, a corporation organized under the laws of the State of Maine, and National Calfskin Company, a corporation also organized under the laws of the State of Maine, are subsidiary companies of the petitioner, all of whose stock, except a few qualifying shares, is and has for many years been owned and held by the petitioner. During the period in question most of the petitioner's upper leather was tanned by A. C. Lawrence Leather Company and National Calfskin Company. Its sole leather was tanned and sold by other corporation, in most of which it had no interest by stock ownership or otherwise.

4. A. C. Lawrence Leather Company was organized in 1897 with an authorized capital of $200,000, increased thereafter from time to time to $5,000,000. In 1919 the entire capital stock, except a few qualifying shares, was sold to the petitioner and has since been owned and held by that company. The certificates representing this stock have continuously been actually held in Massachusetts. The business of A. C. Lawrence Leather Company since [fol. 14] its incorporation has been tanning hides, principally for upper leather for shoes, and selling the leather resulting therefrom on a commission basis, the hides and the leather resulting therefrom remaining the property of the consignor until the leather is sold. Since 1919 most of its tanning has been for the petitioner, although from time to time other companies have furnished hides which were tanned and sold by A. C. Lawrence Leather Company. During the whole period in question the company's tanneries were at Peabody, Massachusetts, and it was doing business continuously in the Commonwealth. It was qualified to do business in the States of Massachusetts, New York, Ohio, Missouri and Pennsylvania, and had selling branches with established offices in the cities of New York, Gloversville and Rochester, in the State of New York, Cincinnati, Ohio, St. Louis, Missouri, and Philadelphia, Pennsylvania; and in 1923 it was admitted to do business in Minnesota and established an office and selling branch at St. Paul in that state.

5. National Calfskin Company was organized in 1900 with authorized capital of $300,000, which was subsequently

increased from time to time to $2,500,000. In 1919 its entire capital stock, except a few qualifying shares, was sold to the petitioner and has since been owned and held by that company. The certificates representing this stock have continuously been actually held in Massachusetts. From 1900 to 1920 the business of National Calfskin Company was purchasing hides, which it tanned in its own plant, and selling the finished leather, which was principally upper leather for shoes, through A. C. Lawrence Leather Company on a commission basis. In 1920 and thereafter its business has been tanning hides belonging to National Leather Company. During the whole period in question the company's tannery was at Peabody, Massachusetts, and it was doing business continuously in the Commonwealth. Besides its State of incorporation it has during the period in question been qualified to do business in Massachusetts and in no other State, and it had during that period no selling branches and owned no property outside of Massachusetts.

6. The Commissioner of Corporations and Taxation, in determining that portion of the excise tax upon the petitioner for the year 1922 which is based upon the value of the corporate excess employed by it within the commonwealth, included the whole of the capital stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the petitioner as assets employed by the [fol. 15] petitioner in business within the Commonwealth. The Commissioner did not include any of the stocks owned by the petitioner of other corporations not engaged in business within the Commonwealth. The Commissioner originally assessed to the petitioner an excise for said year based on its corporate excess employed within the Commonwealth in the sum of $12,806.88, and subsequently assessed an additional excise based on such corporate excess amounting to $21,485.37, making a total assessment of $34,292.25. If the stock of A. C. Lawrence Leather Company and National Calfskin Company belonging to the petitioner had not been included in determining the value of the corporate excess, the excise which would have been assessed upon the petitioner would have been $19,827.89, or $14,464.36 less than the tax actually assessed.

7. The excise originally assessed in the sum of $12,806.88 was paid by the petitioner on October 20, 1922, and the additional excise in the sum of $21,485.37 assessed on May 1, 1924, was paid by the petitioner under protest in writing on May 17, 1924. It is to this additional excise that the proceeding in No. 42124 Equity relates, and a portion of which the petitioner seeks to have abated.

8. The Commissioner of Corporations and Taxation, in determining that portion of the excise tax upon the petitioner for the year 1923 which is based upon the value of the corporate excess employed by it within the Commonwealth, included the whole of the capital stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the petitioner as assets employed by the petitioner in business within the Commonwealth. The Commissioner did not include any of the stocks owned by the petitioner of other corporations not engaged in business within the Commonwealth. The Commissioner originally assessed to the petitioner an excise for the year 1923 based on its corporate excess employed within the Commonwealth in the sum of $21,676.49, and subsequently assessed an additional excise based on such corporate excess amounting to $9,042.67, making a total assessment of $30,719.16. If the stock of A. C. Lawrence Leather Company and National Calfskin Company belonging to the petitioner had not been so included in determining the value of the corporate excess, the excise which would have been assessed upon the petitioner would have been $17,299.48, or $13,419.68 less than the tax actually assessed.

9. Said excises, with interest amounting to $343.21, mak- [fols. 16 & 16a] ing a total of $31,062.37, were paid by the petitioner under protest in writing on April 6, 1924. It is to these excises that the proceedings in No. 41617 Equity relates, and a portion of which the petitioner seeks to have abated.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General. National Leather Company, by Its Attorneys, Philip Nichols, Putnam B. Smith.

Copy. Attest: —— ——, Clerk.

[fol. 17] In Supreme Judicial Court of Massachusetts

[Title omitted]

Rescript—Filed June 30, 1926

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz., Complaint dismissed.

By the Court.

Walter F. Frederick, Clerk.

June 28, 1926.

[fol. 17a] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the Reporter of Decisions, to which reference is made.

[File endorsement omitted.]

[fol. 18] In Supreme Judicial Court of Massachusetts

No. 41617. Equity.

[Title omitted]

Final Decree—November 29, 1926

This cause came on to be heard at this sitting after rescript from the Full Court, and thereupon, pursuant to the terms of said rescript, it is ordered, adjudged and decreed that the petition in said cause be dismissed without costs.

By the Court.

John F. Cronin, Clerk.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 20] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION

RUGG, C. J.:

These are petitions brought under G. L. c. 63, §77, for the recovery of portions of excise taxes levied for the years 1922 and 1923 under G. L. c. 63, § 39, upon a foreign corporation organized under the laws of Maine for the privilege of doing local business within this Commonwealth. During the years in question, the business of the petitioner was purchasing hides and skins, having them tanned by others, and selling the resulting leather through the tanners. Its business was conducted wholly in Massachusetts, its business offices were located here and it carried on no active business outside this Commonwealth. Among other properties the petitioner owned substantially the entire capital stock of the A. C. Lawrence Leather Company, and the National Calfskin Company, corporations also organized under the laws of Maine. The petitioner's upper leather was tanned chiefly by these two corporations, and its sole leather by other corporations in most of which it had no interest by stock ownership or otherwise. In 1919 the entire capital stock of both these corporations, except a few qualifying shares, was bought by the petitioner and has been since owned and held by it. The certificates representing that stock continuously have been actually held in Massachusetts. The business of the Lawrence Company has been tanning hides principally for upper leather for shoes and selling on a commisson basis the resulting leather, which remained the property of the consignor until sold. Its tanneries were at Peabody in this Commonwealth and it has been engaged here in business without interruption. Most, but not all, of its tanning since 1919 has been done for the petitioner. It was qualified to do business and had selling branches in four or five other States. The business of the Calfskin Company since 1920 has been tanning hides belonging to the petitioner. It has been qualified to do business in Massachusetts and in no other State aside [fol. 21] from the State of its incorporation. It had no selling branches and no property outside of Massachusetts. Its tannery has been at Peabody and it has constantly engaged here in business.

In determining the portion of the excise of the petitioner based upon the value of the corporate excess employed by it within the Commonwealth, the commissioner of corporations and taxation included the whole of the capital stock of the Lawrence Company and of the Calfskin Company owned by the petitioner as assets employed by it in business within the Commonwealth, but did not include any of the stocks owned by it in other corporations not engaged in business within the Commonwealth. These petitions are directed solely to the recovery of that portion of the excises assessed by reason of the inclusion of the capital stock of these subsidiary companies as assets employed by the petitioner in business within the Commonwealth. No other attack is made on the excises. The question of law for decision, as stated by the petitioner, "is whether any part of the value of such stocks should have been so included, and if so, what part." The question thus stated is essentially one as to the interpretation of the governing statutes. The commissioner of corporations and taxation in determining under G. L. c. 63, § 44, the "corporate excess employed within the Commonwealth, by every foreign corporation" doing domestic business here is required to give those words the definition and to follow the legislative mandate in G. L. c. 63, § 30, cl. 4, namely, "such proportion of the fair cash value of all the shares constituting the capital stock * * * [on a specified date] as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of" certain tangible properties not here relevant, and "Securities held in the Commonwealth, the income of which, if any, if received by a natural person resident therein, would not be liable to taxation," with exceptions not now pertinent. By §31 of c. 63, it is provided that in determin- [fol. 22] ing "the corporate excess employed within the Commonwealth by a foreign corporation, there shall not be deducted the value of shares in national banks and in voluntary associations, trust and partnerships, nor of other securities the income of which, if owned by a natural person resident in this Commonwealth, would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it

or for its benefit. * * *" Confessedly income from the shares of stock here in question, if owned by a natural person resident in this Commonwealth would be liable to taxation. G. L. c. 62, § 1 (b).

The petitioner held the stock in its two subsidiary corporations for the lawful prosecution of its business. All the facts recited lead to the conclusion that there was no error of law in including the shares of stock for computation of the excise of the petitioner. The entire business of the petitioner was conducted in this Commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner made use of the activities of the subsidiary corporations as essential parts of its business. Without discussing whether any one or more of those factors standing alone would justify the method employed in ascertaining the excise, their collective force is sufficient to that end.

The interpretation of the words of the statute requires this result. The definition of "Corporate excess" in G. L. c. 63, § 30, cl. 3, by the express provision that there shall be deducted the value of securities, the income of which would not be liable to taxation in the hands of a natural person, carries the implication that the value of other securities held by the corporation and not otherwise exempt shall not be deducted. The following section states the proposition [fol. 23] conversely and directs that in ascertaining the corporate excess the value of securities, the income of which if owned by a natural person would be liable to taxation, shall not be deducted. The language of the statute in these two sections is explicit and its meaning is not clouded or obscure. It cannot render subject to direct taxation property not within the jurisdiction; but where other essential elements are present the excise is justified.

Doubtless tax laws are to be interpreted, where reasonably practicable, so as not result in double taxation. Salem Iron Factory Co. v. Danvers, 10 Mass. 514. Tennessee v. Whitworth, 117 U. S. 129, 136. But the case at bar does not violate that principle. Whatever semblance to double taxation it may have is within the power of the Legislature. Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532. Cream of Wheat Co. v. Grand Forks, 253 U. S. 325. Apart

from the domicil of the several corporations and looking for the moment only at tangible property and its physical location, there is jurisdiction to sustain taxation in this Commonwealth. All the business of the petitioner and of one of its subsidiaries and a principal part of the business of the other subsidiary is conducted in Massachusetts. Direct taxation, however, is not here involved, because a part only of an excise or privilege tax is attacked.

General principles are well established to the effect that the situs of intangible personal property is at the domicil of the owner, that the domicil of a corporation is in the State where it is incorporated, and that property permanently located outside a State cannot be taxed. Bergner & Engel Brewing Co. v. Dryfus, 172 Mass. 154. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51, 57. Welch v. Treasurer & Receiver General, 223 Mass. 87. Hawley v. Malden, 232 U. S. 1. International Paper Co. v. Massa- [fols. 24 & 24a] chusetts, 246 U. S. 135. Those principles are accepted, but they do not govern the case at bar. Other principles which are controlling are equally well settled. Property may have a business situs separate from its theoretical situs. Even stock and intangible personal property may be treated as having a situs where actually kept, used and employed in business. Taxation on this theory has been upheld many times. Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395. Liverpool & London & Globe Ins. Co. v. Orleans Board of Assessors, 221 U. S. 346, 354. Bass, Ratcliff & Cretton, Ltd. v. State Tax Commission, 266 U. S. 271. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51, 58, 59, and cases there collected. It may be assumed that shares of stock in a foreign corporation cannot be taxed to a nonresident shareholder. Kennedy v. Hodges, 215 Mass. 112. In the case at bar there is no direct tax on property, but an excise on a foreign corporation, levied solely on the privilege of doing domestic business within this Commonwealth, measured in part on the value of stock employed in business in this Commonwealth. An excise or license tax may be measured in part by property which could not be taxed directly. Flint v. Stone Tracy Co. 220 U. S. 107, 165. Kansas City, Fort Scott & Memphis Railway v. Kansas, 240 U. S. 227, 232. Greiner v. Lewellyn, 258 U. S. 384, 387.

The question, whether the value of the stock of the Lawrence Company attributable to that part of its business and property in other States ought to have been deducted, is not presented on this record. That relates to overvaluation, as to which a different remedy is provided. American Hide & Leather Co. v. Commonwealth, 252 Mass. 345, 346, and cases there collected. G. L. c. 63, § 71.

Complaint dismissed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 25] In Supreme Judicial Court of Massachusetts

No. 41617, Equity, & No. 42124, Equity (Consolidated)

[Title omitted]

Petition for Writ of Error and Assignments of Error—Filed February 25, 1927

Now comes the National Leather Company, plaintiff in the above entitled proceeding, and represents that on the twenty-ninth day of November, 1926 the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts entered final judgment herein in favor of the above named respondent and against the above named petitioner, in which judgment and in the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which more in detail will appear from the assignment of errors which is filed herewith.

And the petitioner further represents:

That the petitioner is a corporation organized under [fol. 26] the laws of the State of Maine, and has been duly authorized to do business in the Commonwealth of Massachusetts and has a usual place of business in said Commonwealth.

That it is the owner of substantially all of the stock of the A. C. Lawrence Leather Company and of the National Calfskin Company, both of said companies being corporations organized under the laws of the State of Maine, and authorized to do business in Massachusetts.

That both of said last named corporations are assessed for and have paid taxes to the Commonwealth of Massachusetts, assessed upon or with respect to all property tangible and intangible owned by them and within the jurisdiction of said commonwealth.

That the statutes of Massachusetts, providing for the taxation of foreign corporations, namely Chapter 63 of the General Laws, impose an annual excise tax upon every such corporation for the privilege of carrying on or doing business in said Commonwealth of five dollars for each thousand dollars of corporate excess employed within the commonwealth; and corporate excess employed within the commonwealth is defined by said statutes to mean such proportion of the fair cash value of all the shares constituting the capital stock of the corporation as the value of the assets, both real and personal, employed in any business within the commonwealth bears to the total assets of the corporation; that said statutes as construed by the highest court of said commonwealth further provide that [fol. 27] in determining the corporate excess employed within the commonwealth as aforesaid, there shall not be deducted securities, the income of which if owned by a natural person would be liable to taxation; and the statutes of said commonwealth, namely Chapter 62 of the General Laws, further provide that the income of the stock of corporations of the class to which A. C. Lawrence Leather Company and National Calfskin Company belong, if owned by natural persons, would be liable to taxation.

That in the years 1922 and 1923 the Commissioner of Corporations and taxation under authority of the foregoing statutes imposed upon the petitioner, and required it to pay, as an excise tax upon the privilege of carrying on or doing business in the Commonwealth of Massachusetts, a tax at the rate of five dollars per thousand upon its corporate excess employed by it within said Commonwealth, and in determining the corporate excess employed by it within said Commonwealth, said Commissioner included all of the stock of said A. C. Lawrence Leather Company and National Calfskin Company owned by plaintiff as assets employed by plaintiff in business in Massachusetts.

That said stocks of A. C. Lawrence Leather Company and National Calfskin Company owned by the National

Leather Company were not property within the jurisdiction of the Commonwealth of Massachusetts.

That petitioner seasonably instituted separate proceed-[fol. 28] ings in the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts to compel the Commonwealth of Massachusetts to repay that portion of said tax which was thus illegally assessed, for both the years 1922 and 1923; and said Court there after ordered that said two cases be and they thereupon were consolidated.

That all of the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court in said proceedings and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit the Supreme Judicial Court of the Commonwealth, and there decided adversely to the plaintiff's contentions and adversely to the existence of the Federal rights claimed.

Wherefore the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed, and that a transcript of the record, proceedings and papers in this suit duly authenticated may be sent to the Supreme Court of the United States.

And the petitioner files its assignment of errors as follows, to wit:

Assignment of Errors

(1) The Court erred in deciding that the provisions of Chapter 62 and 63 of the General Laws of Massachusetts [fol. 29] imposing an excise tax upon foreign corporations for the privilege of carrying on or doing business in Massachusetts measured by such proportion of the value of all the shares constituting their capital stock as the value of their assets employed in any business within said Commonwealth bore to the value of their total assets and requiring stocks of other foreign corporations owned by such corporations to be deemed assets employed in business within said Commonwealth for the purpose of determining the amount of said tax, were not in violation of the Fourteenth Amendment to the Constitution of the United States,

as depriving the plaintiff of its property without due process of law and denying to it the equal protection of the laws.

(2) The Court erred in deciding that the provisions of Chapters 62 and 63 of the General Laws of Massachusetts, imposing an excise tax upon foreign corporations for the privilege of carrying on or doing business in Massachusetts measured by such proportion of the value of all the shares constituting their capital stock as the value of their assets employed in any business within said Commonwealth bore to the value of their total assets, and authorizing stocks of A. C. Lawrence Leather Company and National Calfskin Company, both corporations organized under the laws of the State of Maine, owned by National Leather Company, a corporation organized under the laws of the State of Maine, to be deemed assets employed in business within the Commonwealth of Massachusetts by National Leather Company, for the purpose of determining the amount of said [fol. 30] tax, were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying to it the equal protection of the laws.

National Leather Company, by Its Attorneys, Philip Nichols, Putnam B. Smith, Joseph A. Boyer.

[File endorsement omitted.]

[fols. 31-35] Bond on writ of error for $500.00, approved and filed February 25, 1927, omitted in printing.

[fol. 36] Citation, in usual form, showing service on Arthur K. Reading, filed March 3, 1927, omitted in printing.

[fol. 37] In Supreme Judicial Court of Massachusetts

Præcipe for Transcript of Record—Filed March 17, 1927

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk:

Please incorporate into the transcript of the record, to accompany your return to the writ of error, the reservation to the Supreme Judicial Court, the petitions, answers, order of consolidation, agreed statement of facts, rescript and final decree, besides copies of petition for writ of error, assignments of error, bond and citation and proceedings thereon, and copy of opinion of full bench, the Counsel for the Plaintiff in error deeming the above portions of the record to be material to and necessary for a decision of the questions invoked.

Philip Nichols, Putnam B. Smith, Joseph A. Boyer, Attorneys for National Leather Co.

[fol. 38] Affidavit of Service

I, Joseph A. Boyer, one of the Counsel for the plaintiff in error, declare and state that I have served a copy of the foregoing præcipe on the respondent, by giving a copy thereof in hand to "F. D. Putnam, Esquire, Assistant Attorney General," of Counsel for the defendant in error, at his usual place of business at the State House, Boston, on March 15, 1927.

Joseph A. Boyer.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, March 15, 1927.

Then personally appeared the above named Joseph A. Boyer and made oath that the foregoing statements by him subscribed are true.

Edward S. Farmer, Notary Public. (Seal of Commonwealth of Massachusetts.)

[File endorsement omitted.]

[fol. 39] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 41617

[Title omitted]

WAIVER OF PRÆCIPE—Filed March 23, 1927

Now comes the respondent in the above-entitled cause and waives its right to file a præcipe under paragraph 2 of section 1 of Rule 9 of the Supreme Court of the United States.

Commonwealth of Massachusetts, by F. Delano Putnam, Assistant Attorney General.

[fol. 40] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT THE ENTIRE RECORD—Filed April 9, 1927

Now comes the plaintiff in error herein and designates the following points as those on which it intends to rely:

(1) That it is not within the power of a State to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax shares of stock of other foreign corporations owned by such foreign corporation.

(2) That it is not within the power of a State to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax shares of stock of other foreign corporations owned by such foreign corporation, when the shares of stock of such corporations and all of their assets, so far as they are situated [fol. 41] within the State, are themselves taxed.

(3) That it is not within the power of a State to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax the shares of stock of other foreign corporations owned by such foreign corporation, when such shares of stock, as dis-

tinguished from the assets of such foreign corporation, have no business situs or other situs in such State.

Philip Nichols, Attorney for Plaintiff in Error.

[fol. 42] Statement of Parts of Record to be Printed

Comes now the plaintiff in error herein and designates the following as the parts of the record which it considers necessary to the consideration of the points on which it intends to rely, and the parts of the record to be printed:

All of the record forwarded by the Clerk of the Supreme Court of the Commonwealth of Massachusetts with the exception only of all duplication, all repetition of titles, and all other obviously unimportant matter.

Philip Nichols, Attorney for Plaintiff in Error.

[fols. 43 & 44] Boston, Mass., April 6, 1927.

Receipt of copies of the foregoing Statement of Points and Statement of Parts of Record to be Printed is hereby acknowledged.

F. Delano Putnam, Asst. Attorney General of the Commonwealth of Massachusetts.

[fol. 45] [File endorsement omitted.]

Endorsed on cover: File No. 32,569. Massachusetts Supreme Judicial Court. Term No. 205. National Leather Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed March 28th, 1927. File No. 32,569.